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Honorable Jerry Callen  
State Representative, District 25  
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Jerome, ID 83338

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE  
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: Legislator/Public School District Employee Conflict of  
Interest

Dear Representative Callen:

In light of a recent New Mexico Attorney General Opinion, Opinion No. 88-20 (March 7, 1988), which concluded that a public school teacher or administrator may not serve in the New Mexico state legislature, you have requested the opinion of this office on similar issues under Idaho law. Specifically, you ask the following questions:

- (1) Does Idaho's constitutional and/or code prohibition on individuals serving in the legislature while on payroll as an employee of the state extend to employees of Idaho's public school system?
- (2) If so, can a public school system employee elected to the Idaho legislature continue to contract or receive compensation from a local entity of the public school system?

While the New Mexico Attorney General's Opinion is instructive, it does not appear from a review of Idaho law that a legislator/public school district employee in Idaho is precluded from serving in the state legislature or from entering into an employment contract with a local public school district.

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I.

In regard to your first question, one statutory provision does exist which might operate to prevent certain state employees from also serving in the legislature; however, the statute does not extend to public school district employees. Idaho Code § 59-511 provides, in part:

Each executive and administrative officer shall devote his entire time to the duties of his office and shall hold no other office or position of profit: . . .

The question is whether a public school district employee is considered an "executive or administrative officer" subject to the restrictions of § 59-511.

Although the exact meaning of "executive or administrative officer" has not been interpreted by the Idaho Supreme Court, a 1975 Idaho Attorney General Opinion concluded that "executive officers" are those officers specifically listed in art. 4, § 1, of the Idaho Constitution as constituting the executive department. "Administrative officers" are another subdivision of officers within the executive department which, unlike the executive officers, have "no powers to judge the matters to be done, and usually must obey some superior." See, 1975 Att'y Gen. Op. No. 41-75, at 145.

While not mentioned in the 1975 opinion, Idaho Code § 67-2402 directly supports the opinion's conclusion that executive and administrative offices are limited to offices within the executive branch of state government. Moreover, that section directly answers the question whether public school districts are included within the executive branch:

(1) Pursuant to section 20, article IV, Idaho constitution, all executive and administrative offices, agencies, and instrumentalities of the executive department of state, except for those assigned to the elected constitutional officers, are allocated among and within the following departments:

Department of administration  
Department of agriculture  
Department of commerce  
Department of correction  
Department of employment  
Department of finance  
Department of fish and game  
Department of health and welfare  
Department of insurance  
Idaho transportation department

Industrial commission  
Department of labor and industrial services  
Department of lands  
Department of law enforcement  
Department of parks and recreation  
Department of revenue and taxation  
Department of self-governing agencies  
Department of water resources  
State board of education

The public school districts of Idaho, having condemnation authority, shall be considered civil departments of state government for the purpose of and limited to the purchase of state endowment land at appraised prices.

(2) The governor, lieutenant governor, secretary of state, state auditor, state treasurer, attorney general and superintendent of public instruction each heads a constitutional office. (emphasis added.)

This statute expressly enumerates the departments and offices which constitute the executive branch of Idaho state government, but specifically excludes public school districts except for the limited purpose of "purchasing state endowment land at appraised prices." It is thus our opinion that public school district employees should not be considered "executive or administrative officers" subject to the restrictions of Idaho Code § 59-511.

Idaho Code § 67-2402's specific exclusion of public school districts from the executive branch of Idaho state government also answers the question whether the separation of powers requirement of Idaho Constitution art. 2, § 1, is violated when a public school district employee serves as a member of the state legislature. Because the statute expressly treats public school districts separately from the state board of education and superintendent of public instruction, it is unnecessary to engage in a lengthy analysis to determine whether public school districts are merely arms of these executive branch entities. The legislature has expressly excluded public school districts from association with the executive branch of state government, except for the limited purpose of purchasing state endowment lands. Thus, separation of powers is not implicated when a public school district employee serves in the state legislature.

Assuming that a public school district employee meets the general age and residence requirements to qualify for legislative office set forth in Idaho Const. art. 3, § 6, the only other possible barrier which could prevent that employee from serving as a member of the legislature would be a

determination by either house of the legislature that public school district employees are not qualified to become members of that house. Art. 3, § 9, of the Idaho Constitution provides, in pertinent part:

Each house when assembled shall choose its own officers; judge of the election, qualifications and returns of its own members, determine its own rules of proceeding, and sit upon its own adjournments. . . (emphasis added).

The Supreme Court of Idaho has recognized the legislature's sole authority under art. 3, § 9, to judge the election and qualification of its own members, and has held that a judicial determination concerning those issues would not be binding on the legislature. Burge v. Tibor, 88 Idaho 149, 397 P.2d 237 (1964). Thus, the question of whether a public school district employee is qualified to serve as a member of the state legislature is a matter under Idaho's constitutional scheme for legislative rather than judicial determination.

A review of previous actions of the Idaho legislature does not indicate that it would disqualify one of its members because that member is a public school district employee. First, the Idaho legislature has historically allowed public school teachers and administrators to serve as legislative members. The 49th legislature of which you are a member is no exception. Senators Denton Darrington and Bert Marley and Representatives Louis Horvath, Jr., Richard Adams, Gayle Wilde, Pete Black and L. Ed Brown are all public school teachers or administrators, and their qualifications to serve as members of the legislature were not questioned during the 49th legislative session.

Second, the Idaho legislature has adopted rules to deal with the inevitable conflict of interest problems that are bound to arise from a citizen legislature. Both houses of the legislature have used § 522 of Mason's Manual of Legislative Procedure, which provides in part:

It is a general rule that no one can vote on a question in which he has a direct personal or pecuniary interest. The right of a member to represent his constituency, however, is of such major importance that a member should be barred from voting on matters of direct personal interest only in clear cases and when the matter is particularly personal. This rule is obviously not self-enforcing and unless the vote is challenged the member may vote as he chooses. . . .

Thus, the Idaho legislature has generally handled conflicts by recognizing the importance of a member's right to represent his constituency and by requiring the member to abstain from voting on a particular matter only in "clear cases" of direct and personal conflict. It further appears that the legislature's chosen method of dealing with such clear cases of conflict is to have the member abstain from voting on that particular matter rather than disqualifying the member from serving the office to which he was elected.

## II.

Your second question brings into question the applicability of two statutory provisions that govern and limit the permissible activities of legislators. Idaho Code §§ 59-102 and 59-201 provide as follows:

59-102. Legislators disqualified from holding certain offices. - It shall be unlawful for any member of the legislature, during the term for which he was elected, to accept or receive, or for the governor, or other officials or board, to appoint such member of the legislature to, any office of trust, profit, honor or emolument, created by any law passed by the legislature of which he is a member. Any appointment made in violation of this section shall be null and void and without force and effect, and any attempt to exercise the powers of such office by such appointee shall be a usurpation, and the appointee shall be deemed guilty of a misdemeanor, and, on conviction, shall be fined not less than \$500 nor more than \$5000.

59-201. Officers not to be interested in contracts. - Members of the legislature, state, county, city, district and precinct officers, must not be interested in any contract made by them in their official capacity, or by any body or board of which they are members.

To determine whether either of these statutes prohibits a state legislator/public school district employee from continuing to contract with or receive compensation from a local public school district, it is necessary to examine the state legislature's role over the financing of public school districts and the contracting of school district employees.

The New Mexico Attorney General Opinion which you have brought to our attention relies heavily on the fact that, pursuant to a 1988 constitutional amendment in that state, the state department of education was given control over most, if not all, financial aspects of public schools. The opinion also

relies upon the fact that New Mexico's state legislature has substantial control over the total amount of money available to local school boards to budget for teachers' salaries, and that it had "specifically appropriated funds to increase teachers' salaries." NMAG Op. at 4. The opinion concludes that "this state has so centralized public education that there is very little actual local political control over important decisions about public education." Id. at 8.

A review of Idaho's public school financing system reveals that the Idaho legislature does not exercise such exclusive and centralized control over the total amount of money available to local school districts, nor does the legislature play a direct role in hiring school district employees or determining the salaries or other terms of school district employee contracts. Unlike New Mexico, Idaho has left the ultimate determination of these matters up to each school district's locally elected board of trustees.

A. Funding of the Public School System. An excellent discussion of Idaho's public elementary and secondary school financing system is found in Thompson v. Engelking, 96 Idaho 793, 537 P.2d 635 (1975). In that case, the Idaho Supreme Court upheld the constitutionality of the state's public school financing system despite the fact that the system relies heavily upon local school district property taxes which vary widely from district to district, thus creating differences in the amounts raised and spent among the several districts. The court described the funding of the public school system in detail:

The system is composed of 115 school districts. The funds supporting these public elementary and secondary schools in Idaho are derived from five sources, those being state funds, county property tax, local school district property tax, federal funds, and funds received from miscellaneous sources, such as activity fees and school lunch programs.

96 Idaho at 796. The case goes on to note that, although state funds are uniformly distributed to local school districts based upon the average daily attendance (ADA) of pupils in those districts, local school district trustees have authority to levy additional property taxes in order to raise funds deemed necessary for that district:

The final effect of the Foundation Program is a 22 mill level of taxation that is equalized among the districts. When the mill levy of the districts is combined with the state funds, each district has available essentially the same base amount of funds per ADA. To raise the additional funds deemed

necessary, the locally elected trustees of the individual school districts levy taxes against the taxable property within the district. Because of the variation in the assessed valuation per pupil in the Idaho school districts, the amount which the individual districts can raise with each mill levied varies greatly.

Id. at 798.

The aspect of local control over the total amount of funding available to each school district upheld in Thompson v. Engelking has remained unchanged. To date, the Idaho legislature has seen fit to limit its role in public school financing to approval of general appropriations which are distributed to school districts pursuant to the Foundation Program formula. Specific financial decisions are rather made by each district's board of trustees. Idaho Code § 33-801 grants local school boards the exclusive power and duty to prepare and, after holding a local public hearing, adopt a budget for the school district. Idaho Code § 33-802 similarly grants school boards authority to determine and to levy the amount of property tax necessary to meet the needs of the district for the ensuing fiscal year.

B. Contracting Authority of the Local School Board. Commensurate with the local school board's budgeting and taxing authority, Idaho Code §§ 33-513 and 33-511 grant the school boards the exclusive power and duty to employ professional personnel along with other employees necessary to maintain and operate the public schools within the district. The local school boards thus possess sole authority to enter into contracts with teachers, administrators and other school district employees. See, Hermann v. Indep. School Dist. No. 1, 24 Idaho 554, 135 P. 1159 (1913). As such, it does not appear that the state legislature exercises sufficient control over the fiscal and employment affairs of local public school districts to conclude that a member of the legislature will run afoul of Idaho Code §§ 59-102 or 59-201 by accepting an employment contract with a school district.

C. Idaho Code § 59-102. An Idaho Supreme Court case construing the applicability of § 59-102 indicates that the legislature's role in creating school districts and authorizing district school boards to hire public school district employees is not sufficiently direct to conclude that the legislature itself created the employee positions.

In State v. Gooding, 22 Idaho 128, 124 P. 791 (1912), the court considered whether the governor's appointment of a state legislator to the office of highway commissioner in a newly

created highway district violated a then existing statutory provision similar to Idaho Code § 59-102. That statute made it unlawful for a legislator to accept or be appointed to "any office of trust, profit, honor or emolument created by any laws passed by the legislature of which he is a member." The court first noted that, because the statute required removal from office, it was quasi-criminal in character and was to be strictly construed. 22 Idaho at 132. The court's determination then centered on the meaning of the term "create" in the statute:

The word "create" means to cause to exist or to bring into existence something which did not exist. Said highway district law does not create or purport to create any highway districts, but leaves the creation of such districts with the people. Then the question is presented: Did the legislature create the office of highway commissioner of Shoshone Highway District No. 2?

Id. at 132, 133. The court concluded that although the legislature had passed enabling legislation whereby electors and landowners within a particular territory could create a highway district, it was the local people who created the highway district and thereby brought the office of highway commissioner into existence. Id. at 134. Thus, the court held that the legislature had not "created" the office and the legislator was free to accept his appointment to the position.

The analysis of Gooding appears equally applicable to the issue of whether it is permissible under § 59-102 for a state legislator to accept employment with a local public school district. While it is true that the state legislature makes annual appropriations to the Foundation Program to be distributed to the local school districts, it is the locally elected board of trustees which determines the employee positions available within the local school district and selects the personnel to fill those positions. The state legislature's role in authorizing funds for public school districts is not sufficiently direct to conclude that the legislature is "creating" employee positions within the school district. Therefore, a legislator who accepts employment with a local school district does not violate Idaho Code § 59-102.

D. Idaho Code § 59-201. The requirement of Idaho Code § 59-201 that legislators must not be interested in any contracts made by the body of which they are members is limited to situations involving direct legislative action. Contracts found to be prohibited by cases construing § 59-201 all involve cases in which the public official in question has personally and directly benefitted by the action of the official himself or by the board or body of which the official is a

member. See, e.g., Anderson v. Lewis, 6 Idaho 21, 52 P. 163 (1898) (contract between secretary of state and printing company whereby secretary of state received part of compensation payable to printing company); Nuckols v. Lyle, 8 Idaho 589, 70 P. 401 (1902) (contract by board of school trustees with wife of one member of the board); Robinson v. Huffaker, 23 Idaho 173, 129 P. 334 (1912) (contract or lease with board of county commissioners for use of real or personal property owned by member of board).

The New Mexico Attorney General Opinion cited a New Mexico Supreme Court decision which, like Gooding, supra, requires a direct link before it can be concluded that the legislature authorized the contract. The opinion discussed State ex rel. Baca v. Otero, 33 N.W. 310, 267 P. 68 (1928), as follows:

The Baca court held that a general appropriations bill alone does not "authorize" a contract of employment with the state. This case indicates that we must look at more substantive statutory provisions:

The test would be whether the contract could have been entered into by the state if the act in question had not been passed. If the answer is "yes," the act had no bearing on the contract and did not authorize it. If the answer is "no," the act made the formation of the contract possible. It permitted and therefore authorized the contract within the meaning of the provision.

Note, "Legislative bodies-conflict of interest," 7 N.M. L.Rev. 296 (1967)

N.M.A.G. Opinion No. 88-20 at 18.

As discussed above, Idaho's public school system still gives local school boards the ultimate decision-making authority over the fiscal affairs of school districts and sole authority to contract with school district employees. The legislature has limited its role to approving general appropriations to the Foundation Program. Under the Baca court's analysis, such appropriations do not "authorize" the contracts of public school district employees, because school districts in Idaho can raise additional money through local property taxes to pay employee contracts that exceed the general appropriations. Thus, it does not appear under Idaho's public school system that a state legislator violates Idaho Code § 59-201 by contracting with or accepting compensation from a local public school district.

Conclusion

A review of Idaho's constitutional and statutory provisions governing the qualifications for serving in the Idaho state legislature and the provisions governing the permissible activities of state legislators does not indicate that public school district employees are prohibited from serving in the legislature, or that state legislators are prohibited from accepting contracts with the local public school districts. Idaho Code § 67-2402 specifically excludes public school districts from the executive branch of state government. Thus, public school teachers who serve in the legislature do not violate Idaho Code § 59-511 or the separation of powers requirement of art. 2, § 1. Likewise, the state legislature's limited role in Idaho's public school system is not sufficiently direct to conclude that a legislator who accepts an employment contract with a public school district violates Idaho Code §§ 59-102 or 59-201.

In answering the question you have raised, it is important to recognize that Idaho's legislature is a "citizen legislature" rather than a full time professional legislature. As such, all members of the legislature have varying interests outside the legislature which may from time to time be directly or indirectly impacted by the legislation which they enact. Given the fact that Idaho statutory provisions governing conflicts of interest are very general in nature, a broad and liberal interpretation of those provisions might well prevent many honest, competent and dedicated legislators from serving the constituents they were elected to represent.

The Idaho Supreme Court and the state legislature itself have addressed these considerations by not applying conflict of interest provisions overbroadly, yet applying them effectively to prevent the mischief of self-interested legislation or official action in clear cases where the conflict of interest is direct and personal. Public school teachers and administrators have historically been allowed to serve in the legislature, and it does not appear that their interests are sufficiently direct or personal to warrant their exclusion under present Idaho law.

Sincerely,



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Deputy Attorney General